IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

FAO No.255 of 2000.

Judgment reserved on:2.11.2006.

Date of Decision: 9.11.2006

Sh.Kuldip Chand and others ..Appellants.

Versus.

Sh.Shiv Ram Thakur and others ..Respondents.

Coram:

The Hon'ble Mr. Justice Deepak Gupta, Judge.

Whether approved for Reporting? No

For the Appellants: **Mr. G.D.Verma, Senior Advocate with Mr.B.C.Verma, Advocate.**

For the Respondents: **Mr. R.P.Singh, counsel for R-1. Mr.A.Burathoki, Addl.A.G. for R-2.**

Deepak Gupta, J.

Respondent No.1 Shiv Ram Thakur filed a suit against the present appellants and the State of Himachal Pradesh claiming damages for malicious prosecution. Though the State was impleaded as defendant No.4 in the suit no notice under Section 80 CPC was served upon the State nor any leave was sought under Section 80(2) CPC to file the suit without such notice.

The trial Court framed issues and Issue No.6-A framed by the trial Court reads as follows:

"Whether legal notice was served on defendants No.3&4 as envisaged u/s 80 CPC? If so, its effect?....OPP."

The learned trial Court came to the conclusion that the suit had been instituted without issuing requisite notice to defendants 3&4 and held that the suit against defendants 3&4 was not competent and maintainable and therefore plaint was to be rejected. It also came to the conclusion that the suit against other defendants was also not maintainable for this reason.

Against this order Shiv Ram Thakur filed an appeal before the District Judge, Shimla who dismissed the same vide his order dated 10th November, 1995. A Review Petition was filed and this Review Petition has been allowed and the appeal has been ordered to be re-heard vide the impugned order dated Ist June, 1998. Aggrieved against the said order dated Ist June, 1998 the present appeal has been filed.

At the very outset it may be pertinent to notice that the case of the plaintiff was that the defendant Kuldip Chand had lodged a false FIR No.22 of 1982 with Police Station Dhalli in which false allegations have been made that the plaintiff had committed theft of 50 C.I. rain water pipes from the compound of M/s.Ajit Goods Transport Company (Defendant No.5) at Tara Devi. Defendant No.1 was stated to be a member of defendant No.5. Defendant No.2 was the Chowkidar at the godown of defendant No.5 who is alleged to have initially complained about the theft and named the plaintiff while giving the complaint to his employer. According to the plaintiff, defendant No.3 Ishwar Chand, Head Constable without there being any material proceeded to investigate the matter and also arrested the plaintiff. The challan was filed against the plaintiff under Section 379 IPC. The plaintiff preferred a petition under Section 482 Cr.P.C. before this

Court and in those proceedings, criminal proceedings against the plaintiff were quashed.

Sh.G.D.Verma, learned senior counsel appearing for the plaintiffs has contended that the impugned order amounts to re-opening of the case by the successor District Judge. The argument of Sh.G.D.Verma is that once the predecessor District Judge had taken a decision in his judgment dated 10th November, 1995 that the suit of the plaintiff is not separable from other defendants the successor District Judge could not, in review proceedings, sit in judgment over the verdict given by his predecessor. He has cited a number of decisions including **Patel Naranbhai Jinabhai v. Patel Gopaldas Venidas, AIR 1972 Gujarat 229, M/s.Northern India Caterers (India) Ltd., vs. Lt.Governor of Delhi, AIR 1980 SC 674, Raj Kumar Ramavtar Chorasia vs. Mathew Charian Christian, AIR 1984 Bombay 458, Chandmall Chopra and another vs. State of West Bengal, AIR 1986 Calcutta 111, Purewal and Associates Ltd. and another vs. Punjab National Bank and others, AIR 1992 HP 26, Smt.Meera Bhanja vs. Smt.Nirmala Kumari Choudhury, AIR 1995 SC 455, Lily Thomas etc.etc. vs.Union of India and others AIR 2000 Sc 1650**.

I need not refer to all the judgments in detail. The law is settled that the power of review is not to be exercised on the ground that the earlier decision was erroneous on merits. The correction of an erroneous decision may be done by the appellate Court. However, if the error or the mistake pointed out in the decision is apparent on the face of the record and only one view is possible then the mistake can definitely be corrected in review proceedings.

The Apex Court in **M/s.Northern India Caterers' (supra)** case has held as follows:

> "An error apparent on the face of the record exists if of two or more views canvassed on the point it is possible to hold that the controversy can be said to admit of only one of them. If the view adopted by the Court in the original judgment is a possible view having regard to what the record states, it is difficult to hold that there is an error apparent on the face of the record."

In **Smt.Meera Bhanja's case (supra)** the apex Court held as follows:

> "Now it is also to be kept in view that in the impugned judgment, the Division Bench of the High Court has clearly observed that they were entertaining the review petition only on the ground of error apparent on the face of the record and not on any other ground. So far as that aspect is concerned, it has to be kept in view that an error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any long drawn process of reasoning on points where there may conceivably be two opinions."

In **Lily Thomas's case (supra)** the apex Court held as follows:

> "The dictionary meaning of the word "review" is "the act of looking, offer something again with a view to correction or improvement". It cannot be denied that the review is the creation of a statute. The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not a ground for review."

In the present case in the grounds of appeal filed before the learned District Judge a specific plea had been raised by the plaintiff in the following terms:

> "(d) That the learned Trial Judge has wrongly rejected the prayer of the appellant that even if no notice under Section 80 CPC served upon respondents No.3 and 4 yet the cause of action and case against the private respondents being severable from the case against the State, the consequences of non-service of notice upon the respondents No.3 and 4 would not entail the dismissal of the suit against the private respondents."

This specific plea raised by the plaintiff was dealt with by the District Judge in a very careless and casual manner. The only observation of the learned District Judge in the earlier judgment dated 10.11.1995 is in the following terms:

> "The suit of the plaintiff is not separable from other defendants because the suit is for recovery of damages on account of malicious prosecution."

Neither any case law has been discussed nor the legal proposition has been discussed as to how in a suit for recovery of damages on account of malicious prosecution the suit of the plaintiff was not separable qua the various defendants. In my view there was no proper adjudication by the District Judge and error was apparent on the face of the record. The view taken by him is totally incorrect and against the settled position of law. In cases of tort all tortfeasors are jointly and severally liable and the injured party may file an action for damages on account of tortuous liability against any or all of them. This matter has been dealt with in proper perspective by the successor District Judge in his order dated 1.6.1998.

In view of the above discussion, I find no error in the impugned order, ordering review of the earlier judgment. The appeal is, therefore, dismissed. No order as to costs.

Keeping in view the fact that the appeal was filed as far back as in the year 1991 and the original suit was filed in the year 1983 the learned District Judge is requested to dispose of the case as early as possible and in any event not later than 15th January, 2007. The parties through their counsel are directed to appear before the learned District Judge, Shimla on Ist December, 2006. The Registry shall ensure that the record of the case be remitted back so as to reach well before Ist December, 2006.

November 9, 2006. (Deepak Gupta),
PV Judge.